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No. 88-

In the Supreme Court of the United States

October Term, 1988

LOCKHEED CALIFORNIA COMPANY,
a Division of LOCKHEED CORPORATION,
LOCKHEED CORPORATION,
K.E. KLEINBERG and JAMES KALISH,

Petitioners,

v.

KURT BIRTELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FOUR

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QUESTION PRESENTED

Whether a state, by enacting a general pronouncement in favor of job security for employees who participate in reporting employer violations of unidentified state and federal laws or regulations, unrelated to any system directed to the health, safety or welfare of the state's citizens, may frustrate the express, exclusive and mandatory grievance mechanisms set forth in a collective bargaining agreement and, thereby, contravene the primary national interest of protecting and enforcing such agreements, as embodied in Section 301 of the Labor Management Relations Act, where the employer/employee dispute in issue arises in the context of a report of an alleged violation by an employer of a federal regulation concerning purported statements made to the Department of the Air Force and where the resolution of the claims are specifically addressed within the parameters of the collective bargaining agreement.

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LOCKHEED CALIFORNIA COMPANY, a Division of LOCKHEED CORPORATION, LOCKHEED CORPORATION, K.E. KLEINBERG and JAMES KALISH (hereinafter referred to collectively as "LOCKHEED"),[1] Petitioners herein, respectfully petition the United States Supreme Court to issue a writ of certiorari to review

[1]The individual Petitioners were supervisorial or managerial employees of LOCKHEED. A listing of subsidiaries and affiliates of LOCKHEED is set forth in Appendix D.

the decision of the California Court of Appeal, Second Appellate District, Division Four, entered in this case on May 17, 1988. Review thereof having been denied by the California Supreme Court by its order of August 25, 1988.[2]

OPINIONS BELOW

This Petition seeks review of the decision rendered herein by the California Court of Appeal, Second Appellate District, Division Four. (App. A1-A15.) That decision was subsequently the subject of a Petition for Review in the California Supreme Court. On August 25, 1988, the California Supreme Court denied the Petition for Review, but ordered that the opinion of the Court of Appeal not be published in the Official Appellate Reports of the State of California. (App. B1)

JURISDICTION

The decision of the California Court of Appeal, Second Appellate District, Division Four, issued May 17, 1988, reversed a judgment in favor of LOCKHEED entered by the Superior Court of the State of California for the County of Los Angeles, March 4, 1987. The order of the California Supreme Court denying the Petition for Review was entered August 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS

The following provisions of the Labor Management Relations Act of 1947 (hereinafter referred to as "LMRA"), 29 U.S.C. §§141-87, are pertinent to this case:

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[2]The opinion of the California Court of Appeal appears in Appendix A. The order of the California Supreme Court appears in Appendix B.

Section 201, 29 U.S.C. §171:

It is the policy of the United States that

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees:

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for . . . voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes. . . .

Section 203(d), 29 U.S.C. §173(d):

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

Section 204(a), 29 U.S.C. §174(a):

(a) In order to prevent or minimize interruptions of the free flow of commerce growing

> out of labor disputes, employers and employees and their representations, in any industry affecting commerce, shall.
>
> . . .
>
> (2) whenever a dispute arises over the terms or application of a collective bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously . . . .

Section 301(a), 29 U.S.C. §185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

The following provisions of the statutory law of the State of California are pertinent to this case:

> California Labor Code, section 1102.5(b) provides:
>
> "(b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or compliance or non-compliance with a state or federal regulation."

STATEMENT OF THE CASE

A. FACTS

Respondent, KURT BIRTELL, (hereinafter referred to as "BIRTELL") is an employee of LOCKHEED and a member of the Aeronautical Industrial District Lodge 727/International Association of Machinists and Aerospace Workers (hereinafter referred to as "Union"). At all relevant times, BIRTELL's Union, of which he was continuously a member, and LOCKHEED were parties to a collective bargaining agreement which regulated all aspects of BIRTELL's employment relationship with and work conditions at LOCKHEED. The collective bargaining agreement negotiated between the Union and LOCKHEED explicitly controls management decisions concerning hiring, wages, working hours, promotion, demotion, discipline, and termination. The agreement expressly requires that management exercise its power with respect to the work actions concerning these subject matter areas, including working hours, demotions and disciplinary action, only upon "good cause". Where an issue arises as to whether management exercised its rights and powers in a manner contrary to the provisions of the collective bargaining agreement, a binding dispute resolution mechanism is established to resolve that controversy. The grievance procedure enacted by the agreement is comprised of a four step mechanism, culminating in final and binding arbitration before a mutually agreed, impartial arbitrator.

BIRTELL claims that, during the course of his employment, he was the subject of disciplinary retaliation by LOCKHEED for his having communicated with the Department of the Air Force, Office of Special Investigations, concerning certain alleged inadequacies in LOCKHEED's performance under a federal military

contract.[3] BIRTELL alleges that, following his meeting with the Department of the Air Force, in retaliation LOCKHEED suspended his security clearance, downgraded his position, assigned him work hours and work duties which were undesirable and passed him over for advancement. BIRTELL filed grievances in accord with the Union collective bargaining agreement on April 14, 1981 and November 11, 1984, respectively. In addition to his complaints concerning his work assignment and the conditions of employment the grievances alleged LOCKHEED violated his rights under the collective bargaining agreement by acting without "good cause" and in retaliation. Those grievances proceeded through step two of the grievance procedure, and were resolved by mutual agreement. BIRTELL sought no further review under the collective bargaining agreement and filed no further grievances.

B. PROCEEDINGS

On July 15, 1982, BIRTELL filed an action in the Los Angeles County Superior Court seeking recovery from LOCKHEED based substantially on the claims contained in his previous grievances filed pursuant to the collective bargaining agreement. The complaint alleged the legal theories of "breach of the implied covenant or good faith and fair dealing", "unlawful employment practices", "conspiracy to harass and retaliate", and "intentional infliction of emotional distress." LOCKHEED timely answered the complaint denying the substantive allegations and pleading the affirmative defenses of failure to exhaust the grievance procedures of the collective bargaining agreement and

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[3]BIRTELL asserted his charge constituted a report LOCKHEED violated 18 U.S.C. §1001. However, no charge was ever filed against LOCKHEED by the United States Attorney, who concluded the allegations "lacked sufficient merit". (App. A4.)

federal preemption under Section 301 of the LMRA. On April 15, 1985, BIRTELL filed a second civil action, asserting the same claims for relief against LOCKHEED, based upon the same legal theories, as those presented by his original complaint, though he recited additional allegations of purported disciplinary conduct by LOCKHEED against BIRTELL which he asserted occurred subsequent to the filing of the first action. LOCKHEED timely answered the second complaint. By order of the Superior Court, the two actions were consolidated for all purposes.

Thereafter, LOCKHEED moved for summary judgment on the grounds that the claims alleged in the consolidated actions were addressed in the collective bargaining agreement and, therefore, preempted by federal law pursuant to Section 301 of the LMRA. The motion was also based on the further grounds that the claims were barred by virtue of BIRTELL's failure to exhaust the grievance remedies set forth in the collective bargaining agreement and by the six-month statute of limitations applicable to actions under Section 301. Hearing on LOCKHEED'S motion was had January 21, 1987 in the Los Angeles County Superior Court, before the Honorable Thomas C. Murphy. The ruling on the motion issued by way of a detailed written order which appears in Appendix C, infra. (App. C1-C2.) Therein the court found in favor of LOCKHEED on each of the issues presented. The court specifically ruled that (1) the allegations contained in the consolidated actions referred solely to conditions governed by the collective bargaining agreement and its grievance procedure; (2) BIRTELL's claims were preempted by federal labor law; and (3) BIRTELL had not exhausted the grievance mechanism available to him under the collective bargaining agreement. Accordingly, the Superior Court held that LOCKHEED was entitled to a judgment in

its favor. Judgment was entered on March 4, 1987. On March 24, 1987, BIRTELL timely filed his Notice of Appeal.

On May 17, 1988, the Court of Appeal reversed the judgment entered by the Superior Court. Without analyzing whether any legitimate state interest directed to the health and safety of the citizens of California existed or was involved, and without balancing any such state interest against the enunciated federal labor policies of Section 301 of the LMRA, the Court of Appeal proceeded to conclude that California state law recognized a right in plaintiff independent of the collective bargaining agreement, and, therefore, there is no preemption." In so doing the Court of Appeal emphasized language in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985) which recited that this Court declined to address whether federal preemption under Section 301 reached a situation where an "independent, non-negotiable, state imposed duty" unrelated to rights under a collective bargaining agreement was involved. No attempt was made by the Court of Appeal to evaluate whether that same right was addressed in the collective bargaining agreement or whether recognition of the alleged "independent right" would impact other interests within the collective bargaining agreement or whether in fact there was an independent non-negotiable state duty. The California state law referred to by the Court of Appeal was that state tort law addressing wrongful discharge arising out of an "at will" employer's violation of public policy, first enunciated in this state in the case of *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167 (1980).

The Court of Appeal reviewed those opinions from the United States Court of Appeal, Ninth Circuit, which limit the "public policy" exception to federal preemption

under Section 301, and acknowledged those opinions supported LOCKHEED'S position that in any claim arising from an employment relationship governed by a collective bargaining agreement Section 301 preemption applies unless the employee's conduct, alleged to have been retaliated against, was in furtherance of a clearly identifiable, substantial state public policy protecting the health and safety of the citizens of the state. Nonetheless, the Court opined it was not necessary for it to engage in the process of balancing the state against the federal interests or to determine the existence of such a clearly identifiable substantial state health and safety interest, based on *Allis-Chalmers*.

A Petition for Review of the Court of Appeal opinion was filed in the California Supreme Court on June 27, 1988. By way of its Order, issued August 25, 1988, the California Supreme Court, in bank, denied the Petition for Review, though it directed that the opinion of the Court of Appeal not be published in the Official Appellate Reports of the State of California.

FINALITY OF DECISION

By virtue of the fact that the California Supreme Court has denied LOCKHEED'S Petition for Review in this matter, the decision of the California Court of Appeal, Second Appellate District, Division Four, is a final determination on the merits with respect to the Section 301 preemption issue for the purposes of 28 U.S.C. §1257. *Faretta v. California*, 422 U.S. 806, 812 (1975); *Semi Press Steel Co. v. Department of Revenue*, 419 U.S. 560, 562 (1975).

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AS WELL AS THE NINTH CIRCUIT AND RAISES IMPORTANT QUESTIONS OF LAW WHICH REQUIRE RESOLUTION BY THIS COURT

A. The Decision Of The Court Of Appeal Contravenes The National Interests Of Protecting The Collective Bargaining System And Preserving Uniform Interpretation Of Collective Bargaining Agreements.

For in excess of thirty years this honorable Court has repeatedly reaffirmed and preserved the federal interest in establishing and protecting collective bargaining agreements for the benefit of the national work force. It has recognized that "a collective bargaining agreement is an effort to erect a system of industrial self government. The collective bargaining agreement states the rights and duties of the parties . . . it covers the whole employment relationship . . . and . . . calls into being a new common law. . ." *United States Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-580 (1960). Through this "system of industrial self-government" employers and labor unions and their represented employees jointly establish the terms and conditions of employment and the methods for resolving all disputes among them. *Id.* at 580; 29 U.S.C. §§171, 173(d) & 174(a). Section 301 of the LMRA has repeatedly been recognized by this Court as a uniquely broad source of federal common law with a " 'preemptive force. . . so powerful as to displace entirely any state cause of action'" within its scope. *Metropolitan Life Insurance Co. v. Taylor*, 107 S.Ct. 1542, 1546 (1987). To effectuate the purpose and intent underlying the

enactment of section 301, "the preemptive effect of section 301 must extend beyond suits alleging contract violations." *Allis-Chalmers v. Lueck*, *supra*, 471 U.S. at 210.

Concurrent with and in animation of the enunciation of these principles has been this Court's consistent recognition that the grievance-arbitration provisions of collective bargaining agreements must remain particularly sacrosanct in order to safeguard the collective bargaining system as mandated by Section 301. Since the *Steelworkers Trilogy* decisions in 1960,[4] this Court has emphasized the express policy of the LMRA "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steel Workers v. American Mfg. Co.*, *supra*, 363 U.S. at 566; 29 U.S.C. §173 (d). To effect "full play," arbitration of a dispute cannot be denied unless it is absolutely clear that the arbitration provision cannot be interpreted to cover the dispute; the parties did not bargain for the facts to be found by a court. *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S.Ct. 364, 374, (1987); *United Steel Workers v. Warrior & Gulf Navigation Co. supra*, 363 U.S. at 582-583. Even after a dispute has been arbitrated, the courts may not review the merits of the award, either directly, or indirectly through the guise of evaluating it under any public policy standard. *Id*; *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. at 596.

> A contrary rule which would permit an individual employee to completely sidestep

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[4] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*, 363 U.S. 574; *United Steelworkers v. Enterprise Wheel & Car Corp.* 363 U.S. 593 (1960).

> available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability . . . . A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965); see also *Allis-Chalmers v. Lueck*, *supra*, 471 U.S. at 219-220.

It is well settled that the preemptive force of Section 301 is so powerful as to displace any state of action for violation of a collective bargaining agreement, any claim founded on such an agreement, any claim or rights created by such an agreement or any claim substantially dependent upon an analysis of such an agreement, whether or not those claims seek to vindicate an employee's uniquely personal rights. *Hines v. Anchor & Motor Freights, Inc.*, 424 U.S. 554, 562 (1976); *Franchise Tax Board v. Laborer's Vac. Trust*, 463 U.S. 1, 23 (1982). Individual claims lie at the heart of the grievance and arbitration machinery. They are inevitably intertwined with union interests. When employers and unions agree to limit the labor remedies between them, clearly, they have no intention or expectation that the judiciaries or legislatures of the states may or will conceive of causes of action characterized as "independent" of the labor contract to defeat the exclusivity rule. *Republic Steel Corp. v. Maddox*, *supra*, 379 U.S. at 653; see also *Smith v. Evening News Ass'n.*, 371 U.S. 195, 200 (1962).

It is manifest that the decision of the Court of Appeal in this case directly conflicts with the federal interest in preserving the system of collective bargaining and undermines each of the correlative policies included in the national common law reviewed above by: (1) directly invading the sanctity of the negotiated arbitration-grievance procedure; (2) permitting an individual's claim to sidestep that grievance mechanism and violate the integrity of the system; (3) depriving the union and the employer of their intentions and their contractual expectations; (4) allowing the individual rights of BIRTELL to rise to an independent claim which defeats the exclusivity rule and disrupt the negotiation and administration of collective bargaining agreements; and (5) conceiving of a manner in which to insert a myriad of state judicial interpretations to a single collective bargaining agreement. This Court's decision in *Lingle v. Norge Division Of Magic Chef*, 108 S.Ct. 1877 (1988) admits of no such result and the opinion of the Court of Appeal in this case provides no support in reason or law for any contrary position.

The *Lingle* case in no way departed from this Court's historical development of the common law mandated by Section 301, along with its continued affirmation of those principles necessary to the continued viability of the collective bargaining system. *Lingle* expressly reaffirmed that where resolution of a controversy requires interpretation of a collective bargaining agreement application of state law is preempted by Section 301. *Lingle* only concluded that federal preemption under Section 301 did not extend to that case since the employee claim at issue in *Lingle* arose in the context of the Illinois Workers Compensation Act with its attendant statutory remedies which were expressly excluded from the subject matter of collective bargaining. *Lingle v. Norge Division of Magic Chef*,

supra, 108 S.Ct. at 1883, n. 9. In reaching its holding this Court emphasized that no interpretation of any collective bargaining agreement provision or remedy was required to determine the merits of the plaintiff's claim she had been discharged by her employer in retaliation for her filing of a claim under the Illinois Workers Compensation Act to remedy work related injuries . It is important to note the distinctions between the claim addressed in *Lingle* and that presented by BIRTELL. First, in *Lingle*, the state interest was beyond reasonable dispute given that adjudication was fundamental to the preservation and implementation of the Illinois Worker's Compensation system. Second, unlike the claims of BIRTELL, no reference to or interpretation of the provisions of the collective bargaining agreement was in issue since under express Illinois law the parties to a collective bargaining agreement were precluded from waiving or altering a worker's rights under the state workers' compensation scheme. California has no such prohibition with respect to the rights and remedies here in issue.

Unlike the statute at issue in *Lingle*, the statute here advanced (Labor Code section 1102.5) is not directed to any legitimate interest of the state of California in the health or welfare of its citizens. Such is particularly the case under the facts of BIRTELL's claim. Labor Code section 1102.5 recites that an employer may not retaliate against an employee for his good faith reporting to an enforcement agency of an employer's violation of a federal or state statute or regulation. As such, by its very terms it addresses no particular or unique state interest or system of compensation. At best, in a case where, unlike the case at bar, a state statute has been assertedly violated and a state enforcement agency is involved, section 1102.5 enunciates a policy that the citizens of that state are not to be penalized for

participating in enforcement and conversely facilitates such participation. Under the facts of the BIRTELL claim there is no arguable state interest. The alleged reporting concerned a purely federal interest under a specific federal regulation, concerning military defense contract requirements of the United States government, made to the United States Department of the Air Force. Moreover, the negotiated collective bargaining agreement between BIRTELL's Union and LOCKHEED directly addressed the subjects of discriminatory employment decisions and the remedies therefor in the precise areas of BIRTELL's claims concerning the conditions of his employment, including promotions, demotions, work hours, wages and work assignment.

Given the facts of the instant case, contrary to those of *Lingle*, it is untenable to assert that consideration and interpretation of the collective bargaining agreement is not required. No legitimate state interest can be compromised by requiring BIRTELL to submit his claims to the procedure agreed upon by his Union and his employer for the resolution of disputes concerning work assignment, hours, pay and other conditions of his employment. Yet, by contrast, the entire collective bargaining system, the national federal interest in that system and each of the principles integral to its maintenance are compromised by the decision of the Court of Appeal.

Review of the opinion of the Court of Appeal demonstrates that in fact the court made no analysis through which it was able to identify any legitimate state interest and failed to consider any of the national federal interests clearly involved. Instead, contrary to the prohibition against so doing set forth in *Lucas-Flour*, *Allis-Chalmers*, it simply pronounced that the mere existence in California of tort remedies for employment

disputes gave rise to a state interest sufficient to avoid Section 301 preemption. Yet, such an approach is entirely contrary to law and the dictates of this Court. Responding to an employee's argument that his claim was not preempted because it involved a state statutory tort, in *Allis-Chalmers* this Court wrote:

> Were state law allowed to determine the meaning intended by the parties in adopting a particular phrase or term, all the evils addressed in *Lucas Flour* would recur . . . . If the policies that animate §301 are to be given their proper range, however, the preemptive effect of §301 must extend beyond suit alleging contract violations. These policies require that "the relationships created by [a collective-bargaining] agreement [be] defined by application of an evolving federal common law grounded in national labor policy.
> *Allis-Chalmers v. Lueck*, *supra*, 471 U.S. at 219-220.

The approach used by the Court of Appeal brings to fruition the concern this Court cautioned against in *Allis-Chalmers*. Since claims pertaining to rights and obligations in a collective bargaining agreement may be couched in terms of, or labeled, a state tort claims, if such an approach is sanctioned, any employee can avoid the federal law, circumvent the national policies set out in Section 301 and thereby subvert the entire collective bargaining system. The opinion of the Court of Appeal fosters those disruptive influences upon the negotiation and administration of collective bargaining agreements which this Court has for decades consistently labored to avoid.

B. The Court of Appeal's Reliance On *Garibaldi, Tameny* And *Garcia* To Assert A Health, Safety And Welfare Public Policy Exception To Section 301 Preemption Is Misplaced.

The "public policy" exception to Section 301 preemption was first addressed in *Garibaldi v. Lucky Food Stores*, (9th Cir. 1984) 726 F.2d 1367. It was most recently addressed by this Court in *Lingle v. Norge Division of Magic Chef, Inc., supra*, 108 S.Ct. 1887.[5] Though the Court of Appeal without thorough analysis of the cases, cites *Garibaldi, Tameny* and *Garcia* to justify its conclusion of state interest exception, BIRTELL's claims are clearly beyond the scope of the health, safety and welfare "public policy" exception. *Garibaldi* involved a state claim for wrongful termination in which the employee claimed he was discharged in retaliation for reporting delivery of spoiled milk in violation of a California statute. In reaching its decision, the Ninth Circuit created a public policy exception to Section 301 preemption because it recognized California had a strong interest in protecting employees who "whistle blow" to promote the health and safety of its own citizens in that the enforcement of its tainted milk statute was to protect to its consumer citizens and was its proper primary concern. Therefore, there was no encroachment upon regulation of the employment relationship which was the subject of federal law. *Garibaldi v. Lucky Food Stores*, supra, 726 F.2d at 1374. *Garibaldi* relied upon the holding of the California Supreme Court in *Tameny v. Atlantic Richfield Co., supra*, 27 Cal.3d 167, which,

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[5]This case involves no issue with regard to the congressional intent exception to Section 301 preemption, whether express or implied, (see, *Local 24 Teamsters v. Oliver*, 358 U.S. 283, 296-297 (1959) and BIRTELL has made no such claim at any stage of the proceedings.

though it was not a preemption case but involved an "at will" employer, found a cause of action for "wrongful discharge" premised upon an employee's refusal to fix gasoline prices in violation of a specific state criminal statute to exist because of its recognition that an employee could not be terminated for refusing to commit a criminal act and that said right did not depend on the promises set forth in any employment contract. The Court opined that to hold otherwise would seriously impair the public policy of the state as reflected in its penal code. *Id.* at 176.

In contrast to the legitimate state health, safety and welfare interests addressed by the statutes in *Tameny* and *Garibaldi*, the claims asserted on behalf of BIRTELL refer solely to matters of federal concern which are expressly sanctioned as the proper subject of collective bargaining agreements. Moreover, BIRTELL is employed by a company which conducts business in interstate commerce, was working for LOCKHEED in connection with federal military defense contracts entered into between LOCKHEED and the United States Air Force at the time of the conduct alleged and with regard to the reporting of alleged violations contacted a federal agency concerning enforcement of a federal regulation and contract. The interpretation and enforcement of the military defense contract between LOCKHEED and the Air Force are as well as whether LOCKHEED violated any provision of it or any federal regulation regarding it, are governed by federal law and the sole concern of the United States government which had the exclusive authority to enter and enforce either the agreement or the regulation claimed have been violated. The alleged violations which BIRTELL reported to the Office of Special Investigations related to federal statutes (18 U.S.C. §1001, 31 U.S.C. §3729). The alleged retaliation by LOCKHEED is similarly the subject of

a federal statutory prohibition and remedy (31 U.S.C. §3730) as well as the collective bargaining agreement between BIRTELL's Union and LOCKHEED. Moreover, BIRTELL's employment, unlike that in *Tameny*, was not "at will", but enjoyed the benefits and protections of a negotiated collective bargaining agreement safeguarded by federal law.

It is specious to suggest any legitimate California interest is impacted by the circumstances of this case. As applied by Division Four of the California Court of Appeal in this case, Labor Code section 1102.5 amounts to no more than a bootstrap state intrusion into a purely federal subject matter area, in violation of the national labor policy and section 301. The express purpose of California Labor Code Section 1102.5 as enacted and intended by the legislature of California was to provide "at will" employees with "some minimum protection against retribution by an employer." State of California Assembly Labor and Employment Committee, Staff Comments, AB 2452. As the United States Supreme Court held in *Local 24, Teamsters v. Oliver*, supra, 358 U.S. at 295, where a specific federal statute directed to a precise federal concern exists along with a broad state statutory prohibition, federal preemption applies.

Garibaldi and *Oliver* establish that the public policy exception can only apply where, unlike this case, a clearly identifiable, substantial state health, safety or welfare policy is furthered. Those cases decided subsequent to *Garibaldi*, including this Court's decision in *Lingle*, consistently so hold. *Olguin v. Insp. Consol. Copper Co.*, (9th Cir. 1984) 740 F.2d 1468, 1475; *Young v. Anthony's Fish Grottos, Inc.*, (9th Cir. 1981) 830 F.2d 993, 1001; *Lingle v. Norge Division of Magic Chef, supra*, 108 S.Ct. 1882-1883. As the Court in *Olguin* declared,

"Arizona has little interest in enforcing federal law, even if the federal law is incorporated, as Olguin suggests, in the state's general public policy." *Olguin v. Insp. Consol. Copper Co., supra*, 740 F.2d at 1475.

C. The Need for Review in This Case is Established By Analysis of the *Lingle* Opinion and this Court's Application of That Decision in Subsequent Cases.

That *Lingle* provides no support for the Opinion of the California Court of Appeal in this case is clear from the thorough analysis above. On the contrary, *Lingle*'s holding that preemption does apply under its facts is inapposite to this case. Moreover, those cases in which this Court has subsequently directed that its holding in *Lingle* does apply establish that there remains a critical need to correct the decision of the Court of Appeal in this case and instruct the state courts, as well as the federal circuit and district courts, regarding the limits of the health, safety and welfare public policy exception to Section 301 preemption. Neither *Lingle* nor any subsequent case in which this Court has granted certiorari has presented a circumstance in which a state statute has provided the bases to avoid preemption though the only policy interests at issue have been federal regulation.

There have been seven cases with published opinions since *Lingle* in which this Court has granted certiorari. Five emanated from the Seventh Circuit and dealt with the identical Illinois statue at issue in *Lingle: Willoughby v. Central Illinois Light. Co.*, 108 S.Ct. 2812 (1988); *Doherty v. Pansec Inc.*, 198 S. Ct. 2812 (1988); *Clark, et al. v. Momence Packing Co.*, 108 S.Ct. 2813 (1988); *Martin v. Carling Nat'l. Breweries*, 108 S.Ct. 2813 (1988); *Hanneken v. Dixon Distributing Co.*, 108 S.Ct. 2813 (1988). The case of *DeSoto v. Yellow Freight Lines Co.*,

108 S.Ct. 2813 (1988) involved an employee's claim of retaliatory discharge for the employee's refusal to follow a direction by his employer to violate a state Vehicle Code Section. The sole remaining case, *Mays v. R. J. Reynolds Co.*, 108 S.Ct. 2814 (1988), dealt with a claim of defamation by an employee against his employer arising out of acts of the employer following termination of the employee.

II.

ASSUMING WITHOUT CONCEDING CALIFORNIA HAS ANY IDENTIFIABLE STATE INTEREST, BALANCING OF THAT STATE INTEREST AGAINST THE FEDERAL INTEREST IS ESSENTIAL TO DETERMINATION OF THE PREEMPTION ISSUE.

The California Court of Appeal concluded that a state legislative enactment may displace both federal law and the national labor policy so long as a "state has seen fit to recognize a cause of action available to all employees, regardless of the terms of any labor contract (including a collective bargaining contract) which the employee may or may not have been a party". (App. A.) The Court further opined that under such circumstances of competing state and federal policies it need not balance the federal interest against those of the state, but may simply ignore the entirety of the national labor law policies underpinning the collective bargaining system. (App. 1-22.) This approach is in direct contravention of the Ninth Circuit cases which address analysis of the public policy exception[6] and this Court's decisions in *Oliver* and *Lingle*. Even if BIRTELL's claims

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[6] *Garibaldi v. Lucky Stores, Inc.*, *supra*, 726 F.2d at 1373; *Olguin v. Insp. Consol. Copper Co.*, *supra*, 740 F.2d at 1473; *Bloom v. General Truck Driver*, (9th Cir. 1986) 783 F.2d 1356, 1360.

raised issues concerning a legitimate state health, safety or welfare interest, the Court of Appeal was required to engage in a balancing of those interests against the federal interests involved in order to properly decide the preemption issue.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Petition for Certiorari be granted. Certification pursuant to Supreme Court Rule 28.2 is being mailed to this Court concurrently, by separate notarized correspondence of counsel.

Respectfully submitted

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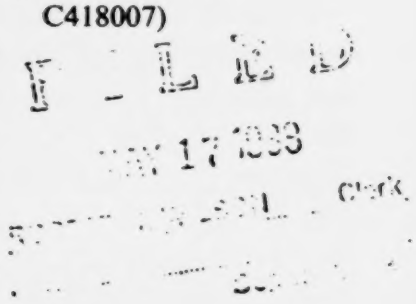
APPENDIX

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

KURT BIRTELL,	)	No. B026558
Plaintiff and Appellant,	)	(Super. Ct. No.
v.	)	C418007)
LOCKHEED-CALIFORNIA COMPANY, et al.,	)	
Defendants and Respondents.	)	
	)	



APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Murphy, Judge. Reversed.

Allred, Maroko, Goldberg & Ribakoff, Michael Maroko and Christine Masters for Plaintiff and Appellant.

Chase, Rotchford, Drukker & Bogust, John A. Daly and Clay Robbins, III for Defendants and Respondents.

Plaintiff and appellant Kurt Birtell appeals from the "Judgment granting defendants' Motion for Summary Judgment." In this consolidated action plaintiff alleges that his employer defendant Lockheed[1] tortiously retaliated against him because he reported to the United States Department of Air Force OSI Investigation Unit, Lockheed's

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[1]Throughout this opinion reference to defendant Lockheed indicates a reference collectively to defendants Lockheed-California Company and Lockheed Corporation.

"(a) Utilization of noncertified inspectors to inspect top secret military products, in contravention with Military Specifications; (b) Improper calibration standards for inspection of highly sensitive and potentially life-threatening military products [and] (c) [allowing] employees . . . who did not have top secret clearance . . . to work on projects which were classified as top secret." Plaintiff also alleges that defendants K. E. Kleinberg and Jim Kalish conspired with Lockheed to retaliate against him.

Defendants collectively moved for summary judgment on the grounds that (1) plaintiff's action was preempted by federal law pursuant to section 301 of the Labor Management Relations Act (29 U.S.C. § 141) (hereafter section 301); (2) plaintiff's action was barred because he failed to exhaust his administrative remedies under available grievance procedures and (3) plaintiff's action was barred by the six-month statute of limitations applicable to action under section 301.

The following facts were undisputed: plaintiff was part of a collective bargaining unit addressed in a collective bargaining agreement between defendant Lockheed and plaintiff's union. Under that agreement defendant Lockheed retained control of disciplining its employees for just cause. Any claim that defendant acted contrary to the agreement could be addressed through the grievance mechanism set forth in that agreement. Plaintiff filed grievances on August 14, 1987 and on November 11, 1981. Those grievances proceeded through step two of the grievance procedure outlined in the collective bargaining agreement. Plaintiff took no further action on either grievance.

While plaintiff disputes whether the subject matter of those grievances constitutes the entirety of the conduct of which he complains in this action it is clear that at least a substantial part of the conduct which formed the basis of plaintiff's grievances also forms the basis of this action.

In opposition to the motion for summary judgment, plaintiff submitted his declaration and that of his counsel which incorporated various deposition excerpts.

In his declaration plaintiff outlined his rapid ascension as an employee of defendant Lockheed, ultimately leading to his position as an "ultrasonics inspector." Plaintiff explained that while in that capacity he "observed that certain inspection procedures on the C-4 Trident missile nose cap were not being done according to military specifications." He also noticed that "other tests performed by Ultrasonics Inspectors were not proper and that certification of such inspections were not according to specifications."

Plaintiff explains that the measures he took at Lockheed in an effort to correct these violations were of no avail. Accordingly he decided to take his concerns elsewhere. He was eventually put in touch with one William Edwards an investigator with the United States Air Force office of special investigations. Mr. Edwards decided an investigation was warranted. The day following plaintiff's initial meeting with Mr. Edwards, Lockheed commenced its retaliatory conduct against plaintiff. This retaliatory conduct eventually included Lockheed's suspension of plaintiff's access to security projects; his transfer from the lab in which he was working; his assignment to an entry level position; unavailability of overtime; implied and express threats to his job security; being singled out for reprimand and being passed over for advancement.

In one of several deposition excerpts plaintiff submitted in opposition to summary judgment, Mr. Edwards testified that during his investigation "in reviewing the records of training of some of the inspectors that some of the inspectors who had not been trained for certain procedures had signed off as having accomplished those procedures." Mr. Edwards elaborated "[t]here was a major problem with the inspection of some P-3 wings. The P-3 Orient is a type of airplane." At the conclusion of his investigation Mr. Edwards "felt that we had enough facts to make the case appealing to the U.S.

Attorney. Unfortunately, . . . the U.S. Attorney did not feel that it was worthy of prosecution." The U.S. Attorney felt "the case lacked sufficient merit for prosecution. . . . [T]here was a technical violation, but no loss to the government allegedly." Mr. Edwards thought the situation that plaintiff had uncovered "was dangerous for air force people and equipment [and] was corrected as a result of his action."[2]

The trial court granted defendants' motion for summary judgment. It ruled that "all claims asserted by plaintiff in both actions are preempted by section 301 of the Labor Management Relations Act, and as such plaintiff's claims in the within pending consolidated actions must be dismissed as preempted by federal law. In addition, . . . all claims asserted by plaintiff in both actions are barred by reason of plaintiff's failure to exhaust the grievance procedure set forth in the collective bargaining agreement, and that plaintiff agreed that each grievance should be closed. . . . [Moreover] the exception relied upon by plaintiff . . . to the requirement that the grievance procedures set forth in the collective bargaining agreement be exhausted is not applicable to [this consolidated action]."

CONTENTIONS

On appeal plaintiff contends that his action is not preempted by federal law.

DISCUSSION

"The purpose of the summary judgment procedure under Code of Civil Procedure section 473c is to expedite litigation by avoiding needless trials. [Citation.] A summary judgment must, and may only, be properly granted where no material

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[2]Defendants submitted a series of evidentiary objections to plaintiff's declarations. However, defendants' failure to procure a ruling by the trial court on these objections constitutes a waiver of them. (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 2030, pp. 1992-1993.)

triable issue of fact exists and the moving party's affidavits set forth sufficient facts to sustain a judgment in its favor. [Citations.] When no triable issue of fact exists and the contentions of the parties turn upon an issue of law, summary judgment is proper. [Citation.] Inasmuch as summary judgment denies the right of an adverse party to a full trial of the case, it should be used with caution. Any doubts as to the propriety of granting such motion should be resolved against the moving party. [Citation.]" (*Ferrell v. Southern Neveda Off-Road Enthusiasts, Ltd.* (1983) 145 Cal.App.3d 309, 313.)

Employing this standard we must determine whether as a matter of law defendants' alleged tortious retaliation against plaintiff, which forms the basis for all of plaintiff's causes of action, is preempted by section 301. Section 301 provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties. . . ." (29 U.S.C. § 185(a).) Under this section "[a] suit for breach of a collective bargaining agreement is governed exclusively by federal law. . . ." (*Young v. Anthony's Fish Grottos, Inc.* (9th Cir. 1987) 830 F.2d 993, 997.)

The basis for federal preemption in this area comes from the fact that "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' [Citations.] The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective

bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." (*Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 103-104, fn. omitted.)

Recently the Supreme Court in *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202 [82 L.Ed.2d 206, 104 S.Ct. 1904], analyzed whether the policy set out in *Lucas Flour* required preemption of an action by an employee for an employer's alleged breach of the covenant of good faith even though it was not a direct suit for breach of contract. The court commenced its analysis by explaining: "If the policies that animate § 301 are to be given their proper range, . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. These policies require that 'the relationships created by [a collective bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.' [Citation.]" (*Allis-Chalmers Corp. v. Lueck, supra,* 471 U.S. 202, 210-211.) However, the court was careful to explain that "[i]n extending the pre-emptive effect of § 301 beyond suits for breach of contract, *it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.*" (*Id.,* at p. 212, fn. omitted; italics added.)

In light of this standard the court explored the origins of an action for breach of a covenant of good faith and concluded "[t]he duties imposed and rights established through the state tort . . . derive from the rights and obligations established by the contract." (471 U.S., at p. 217.) Therefore, the court held that the action for breach of a covenant of good faith there involved was inextricably intertwined with the terms of the collective bargaining agreement and thus was preempted by section 301. In reaching

this conclusion, the court passed "no judgment on whether an independent, nonnegotiable, state-imposed duty which does not create similar problems of contract interpretation would be pre-empted under similar circumstances. " (*Ibid.*, fn. 11.)

The issue now before us boils down to whether, under the standard set out in *Allis-Chalmbers,* an action by an employee under state law for an employer's allegedly tortious retaliatory conduct, is preempted under section 301.

The various jurisdictions to have considered whether an employee's action based on the employer's retaliatory conduct is preempted under section 301 have reached divergent results. (E.g. *Gonzalez v. Prestress Engineering Corp.* (Ill.App. 1986) 503 N.E.2d 308 [no preemption of action by employee against employer for discharge in retaliation of employee's exercise of worker's compensation rights]; *Baldracchi v. Pratt & Whitney Aircraft Div.* (2d Cir. 1987) 814 F.2d 102 [same]; *Johnson v. Hussmann Corp.* (8th Cir. 1986) 805 F.2d 795, 979 [preemption of claim by employee against employer for discharge in retaliation of exercise of worker's compensation rights]; *Vantine v. Elkhart Brass Mfg. Co., Inc.* (7th Cir. 1985) 762 F.2d 511, 517 [same].) The Supreme Court has thus far declined to consider this issue. (*Prestress Eng. Corp. v. Gonzalez* (1987) ___ U.S. ___, 97 L.Ed.2d 779, 780; see *Electrical Workers v. Hechler* (1987) 481 U.S. ___, 95 L.Ed.2d 791, 803-804, fn. 5 [court holds employee did not preserve issue that his tort claim was based on a state law independent of the employment contract. Therefore, the court declined to rule on the effect that state law would have on the preemption issue].)

Even within the Ninth Circuit, the law in this area is less than clear. In *Garibaldi v. Lucky Food Stores, Inc.* (9th Cir. 1984) 726 F.2d 1367, certiorari denied 471 U.S. 1099, an employee claimed he was discharged in violation of public policy in retaliation for his report to local health authorities that he had been instructed by his employer to deliver adulterated milk.

The court focused on the California Supreme Court's opinion in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, which approved an employee's right to sue his employer for wrongful discharge for refusal to fix retail gasoline prices in violation of federal law. In *Tameny* the court recognized the "employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied ' "promise[s] set forth in the [employment] contract" ' . . . but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes." (Id. at p. 176.)

Based on the nature of this tort, the *Giribaldi* court held that action was not preempted. The court reasoned: "A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The remedy is in *tort,* distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public—an interest which transcends the employment relationship." (*Giribaldi v. Lucky Food Stores, Inc., supra,* 726 F.2d at p. 1375.)

Following *Garibaldi,* the Ninth Circuit has rendered several opinions in an effort to define the limits of preemption in cases based on retaliatory discharge. For example, in *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857, appeal pending, the court held an action by a group of employees was not preempted where they were terminated due to their refusal to fill generators with gasoline under unsafe conditions in violation of state health and safety standards. The court concluded "[s]tate health and safety standards benefit all employees as individual workers, not because they are or are not members of a collective bargaining association. And California's interest in providing the private cause of action is in the enforcement of the underlying statute or public policy, not to regulate the employment relationship." (*Id.*, at p. 863.)

On the other hand in *Young v. Anthony's Fish Grottos, Inc., supra,* 830 F.2d at page 1002, the court held that an employee's claim that she was fired in retaliation for organizing a protest of an IRS "tip audit" was preempted by section 301. The court reasoned there is no "public policy of California protecting opposition to IRS tax audits. Because no state public policy transcending the employment relationship protects [the plaintiff's] actions her wrongful termination claim is preempted." Similarly in *DeSoto v. Yellow Freight Systems, Inc.* (9th Cir. 1987) 820 F.2d 1434, 1438, the court held a plaintiff's claim that he was fired for refusal to drive a truck which he erroneously believed had expired registration was preempted under section 301. "Unlike *Garibaldi,* [the plaintiff] was not fired because of obedience to a state statute designed to protect the health of the citizens of California. He was fired because he had in good faith believed that it was illegal for him to drive the trailer without the requisite permits in the truck." (*DeSoto v. Yellow Freight Systems, Inc., supra,* 820 F.2d at p. 1438.)

Finally, in *Olguin v. Inspiration Consolidated Copper Co.* (9th Cir. 1984) 740 F.2d 1468, plaintiff sought to state a claim for wrongful termination in violation of public policy under Arizona law based upon his employer's alleged violation of the federal mine safety and health act. In holding his action was preempted, the Court of Appeal reasoned: "Arizona has little interest in enforcing federal law, even if the federal law is incorporated, as [the plaintiff] suggests, in the state's general public policy." (*Id.,* at p. 1475.)

Defendants interpret this line of cases as holding section 301 preemption applies unless "a clearly identifiable, substantial state public policy was being furthered by the employee's conduct." In other words, they state, it is not sufficient that the employee's claim under state law is wholly independent of the labor agreement and can be decided without reference to that agreement. Additionally the state policy furthered by the employee's action must be "substantial," otherwise the action is preempted. Indeed there is

language in the above cited Ninth Circuit cases to support defendants' interpretation.

However, in order to construe those cases to be consistent with the Supreme Court's reasoning on the subject, as expressed in the *Lucas Flour* and *Allis-Chalmers* opinions, we must conclude that the weight of the state policy furthered by the employee's extra contractual cause of action is not dispositive of the preemption issue. Rather, as long as the state has seen fit to recognize a cause of action available to all employees, regardless of the terms of any labor contract to which an employee may or may not be a party, which cause of action can be completely litigated without reference to any such labor agreement, there is no preemption under section 301.

Otherwise courts would be required to engage in a balancing test to determine the preemption issue: if the state policy is "substantial" enough there would be no preemption, if it were not then there would be preemption. In *Allis-Chalmers,* the court was careful to note that unlike the standard to determine whether there is preemption to protect the jurisdiction of N.L.R.B. where there is a balancing of federal and state interests (*San Diego Unions v. Garmon* (1959) 359 U.S. 236) "[i]n this situation the balancing of state and federal interests . . . is irrelevant, since Congress, acting within its power under the Commerce Clause, has provided that federal law must prevail." (*Allis-Chalmers Corp. v. Lueck, supra,* 471 U.S. at p. 214; fn. 9.) Simply put, the weight of the state interest is irrelevant to the preemption issue. Instead, under *Allis-Chalmers,* preemption turns solely on whether the state cause of action is wholly independent of any labor agreement. If it is, there is no preemption.

The sole California state court decision to discuss section 301 preemption in this setting is *Friday v. Hughes Aircraft Co.* (1986) 188 Cal.App.3d 117. In *Friday,* plaintiff argued his action for wrongful termination was not preempted by section 301 because his termination was in part, a result of the employer's retaliation for his complaints about the safety

of his workplace. In rejecting this argument the court reasoned: "We find the facts reported in [the plaintiff's] declaration imply nothing more than complaints about the safety of his workplace, a subject expressly covered by . . . the collective bargaining agreement. [The plaintiff] did not report the clear violation of a specific statute for the protection of the general public, as in *Garibaldi,* but complained of what he perceived to be unsafe internal practices in the handling of chemicals. Unlike *Garibaldi,* where the maintenance of the state law cause of action was justified 'to assist in the enforcement of statutes or policies extrinsic to the employment relationship' (citation), allowing [the plaintiff's] wrongful termination action to go forward would involve consideration of the terms of the labor contract and directly interfere with federal regulation of disputes arising out of collective bargaining agreements." (*Id.,* at p. 124.)

Defendants read *Friday* as holding that whenever the subject of a state cause of action is covered by a collective bargaining agreement that cause of action is preempted by section 301. While there is language in *Friday* that could be used to support defendants' position, such a conclusion would be inconsistent with *Allis-Chalmers.* There the court concluded: "[There is no] suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of § 301 beyond suits for breach of contract, *it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."* (*Allis-Chalmers Corp. v. Lueck, supra,* 471 U.S. at pp. 211-212, fn. omitted, italics added.)

Thus, even assuming, arguendo, defendants are correct in claiming the subject matter of this suit is covered by the collective bargaining agreement, *as long as California state law establishles a right in plaintiff independent of that agreement there is no preemption.* Accordingly, we must determine whether there is an issue of material fact whether the subject matter of this suit is actionable under California law independent of the subject collective bargaining agreement.

Defendants argue no such independent cause of action exists inasmuch as there is no "authority which supports [plaintiff's] claim that this state possesses a public policy interest in protecting all alleged 'whistle-blowers' under all circumstances. It is only where the purported 'whistle blowing' is undertaken in an effort to further a specific matter of state or local concern that such a public policy has been or may be found."

However, under circumstances virtually identical to that in the present case the court in *Garcia v. Rockwell Intern. Corp.* (1986) 187 Cal.App.3d 1556, recognized an employee's cause of action for wrongful retaliation. In *Garcia,* the plaintiff sued his employer claiming it wrongfully retaliated against him because he informed a representative of NASA that defendant was engaged in overcharging. The trial court granted summary judgment in favor of defendant and the Court of Appeal reversed.

First the court held that a cause of action could be stated under *Tameny v. Atlantic Richfield Co., supra,* 27 Cal.3d 167, for an employer's retaliatory conduct falling short of termination of the employee. The court then concluded: "There is no question public policy forbids retaliatory action taken by an employer against an employee who discloses information regarding an employer's violation of law to a government agency. Labor Code section 1102.5, subdivision (b) provides: 'No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to

believe that the information discloses a violation or noncompliance with state or federal regulation.' " *Garcia v. Rockwell Internat. Corp., supra,* 187 Cal.App.3d at p. 1561, fn. omitted.)

The court noted that while "Labor Code section 1102.5 was enacted in 1984 [and was effective on January 1, 1985], after the retaliatory action alleged by plaintiff in this case . . . in our view, the Labor Code section merely enunciated already existing public policy." (187 Cal.App.3d at p. 1561, fn. 1.)

In the present case the acts of alleged retaliation which form the basis of plaintiff's first action (L.A.S.C. No. C418007) occurred prior to the effective date of Labor Code section 1102.5 while the acts which form the basis of plaintiff's second action (L.A.S.C. No. C543095) occurred after the effective date of that section. However, regardless of the applicability of that section all of the alleged acts clearly violated the public policy of this state which forbids "retaliatory action taken by an employer against an employee who discloses information regarding an employer's violation of law to a government agency." (187 Cal.App.3d at p. 151.)

In arguing Labor Code section 1102.5 does not apply here, defendants assert "the record on appeal does not contain any evidence to support a claim that [plaintiff's] communication with the OSI was for the purpose of reporting 'a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.' "

This assertion fails for several reasons. First, defendants lost sight of the posture of this case. Defendants moved for summary judgment. Accordingly, it was their burden "to negotiate completely an essential element of plaintiff's case or to establish a complete defense. [Citation.]" (*Fireman's Fund Ins. Co. v. City of Turlock* (1985) 170 Cal.App.3d 988, 994.) Thus, in arguing that plaintiff has not stated a claim for violation of public policy it was incumbent on defendants to demonstrate plaintiff's claim fell outside of the reach of

Labor Code section 1102.5 and the policy which it codified. If the record on appeal contains no evidence on this issue, that indicates only that defendants failed to meet their burden in this regard.

However, the record on appeal does contain evidence on this issue. In the deposition of Inspector Edwards he testified he felt that Lockheed's actions "probably [violated] something like 1001 USC; 1001,[3] false statements; the stamping of a particular document offered to the government." This alone prevents us from concluding as a matter of law that plaintiff did not report a violation of statute or regulation.

We therefore necessarily conclude that issues of material facts exist as to whether defendants engaged in retaliatory conduct in violation of the public policy of this state as reflected in Labor Code section 1102.5. Since the determination of whether defendants engaged in this tortious conduct is wholly independent of the collective bargaining agreement this action is not preempted by section 301.[4] Accordingly,

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[3]This is an obvious reference to 18 United States Code section 1001.

[4]Plaintiff pleads several causes of action based upon the retaliatory conduct in which defendants allegedly engaged. In his first action he pleads causes of action for breach of the implied covenant of good faith and fair dealing, unlawful employment practices, conspiracy to harass and retaliate and intentional infliction of emotional distress. In his second action he alleges identical causes of action. Since each cause of action is based on the identical alleged conduct which is actionable independent of the collective bargaining agreement there is no section 301 preemption. The label attached to the various causes of action is irrelevant to a determination of the preemption issue and the propriety of the issuance of the summary judgment. (See *Plumbers' Union v. Border* (1962) 373 U.S. 690, 698 ["It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction"].) In concluding there is no section 301 preemption of the subject matter of this consolidated action, we need not, and do not, decide whether each independent cause of action is adequately pleaded.

the trial court abused its discretion in erroneously concluding plaintiff's claims were preempted by section 301.

Finally, because we conclude this action is not preempted by section 301 and since this action is grounded on a tort theory, we need not, and do not, reach defendants' contentions that plaintiff failed to exhaust his administrative remedies and that his claims are barred by the six-month statute of limitations applicable to actions under section 301. Both contentions are wholly premised on the application of section 301 and are not relevant unless this action is preempted by that section. (See *Garibaldi v. Lucky Food Stores, Inc., supra,* 726 F.2d at p. 1375.)

Judgment for respondents is reversed. Appellant shall recover his costs on appeal.

CERTIFIED FOR PUBLICATION

McCLOSKY, Acting P.J.

We concur:

GEORGE, J.

ROTHMAN, J.*

---

*Assigned by the Chairperson of the Judicial Council.

SUPREME COURT
FILED
AUG 25 1988
Clerk
DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 4, No. B026558

S006222

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BIRTELL

v.

LOCKHEED-CALIFORNIA COMPANY et al.

Respondent's petition for revieww DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed May 17, 1988, which appears at 201 Cal.App.3d 293. (Cal. Const., Art. VI, section 14; Rule 976, Cal. Rules of Court.)

Chief Justice

DEPT. NC B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date JAN 21, 1987	E A DESPOL, Deputy Clerk
HONORABLE THOMAS C MURPHY JUDGE	NONE, Reporter
R REEN Deputy Sheriff Court Attendant	(Parties and counsel checked if present)

C 418 007 (transferred Burbank)	Counsel for ALLRED-MAROKO-ET AL
KURT BIRTELL	Plaintiff
LOCKHEED CALIFORNIA CO., ETC., ET AL	Counsel for CHASE-ROTCHFORD-ET AL Defendant

NATURE OF PROCEEDINGS:

RULING AFTER SUBMISSION

The matter, heretofore submitted JAN 9, 1987, is further considered and the Court now rules:

The motion of defendants for Summary Judgment is granted on the grounds more fully set forth in the Court's RULING, which is signed and filed this date.

Counsel for defendant is directed to prepare the appropriate judgment and to give notice.

Any setting for trial and Mandatory Settlement Conference is vacated and set aside.

DEPT NC B

MINUTES ENTERED
JAN 21, 1987
COUNTY CLERK

APPENDIX C

Counsel for the appearing parties are notified by a copy of this minute order and by a copy of the Court's RULING.

A Certificate of Mailing is executed and filed by the court clerk this date.

FILED
JAN 23 1987

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

KURT BIRTELL, Plaintiff, vs. LOCKHEED CALIFORNIA COMPANY, et al., etc., Defendants.	CASE NO. C 418007 (Consolidated with C 543095 and transferred to North Central District) RULING ON MOTION OF DEFENDANTS LOCKHEED CALIFORNIA COMPANY, LOCKHEED CORPORATION, K. E. KLEINSBERG AND JIM KALISH FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION OF UNDISPUTED FACTS

The above-entitled matter having come on for hearing, the Court having heard the argument of counsel, having read the declarations and documents, having been briefed and had an opportunity to review the memorandums of points and authorities, hereby makes the finding that the following facts are undisputed:

1. At all times referred to in plaintiff's Complaint, plaintiff was a member of the

Declarations of
T. Harwood
and R. Swindlehurst

Collective Bargaining Unit addressed in the applicable collective bargaining agreement between plaintiff's employer and the Aeronautical Industrial District Watch 727 and the International Association of Machinists and Aerospace Workers ("union").

000024

2. At all times referred to in plaintiff's Complaint, the union was the exclusive representative of the plaintiff for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and all other conditions of plaintiff's employment.

Declarations of T. Harwood and R. Swindlehurst

3. Pursuant to the applicable collective bargaining agreement, plaintiff's employer had and retained control and power to manage the plant and direct the working forces, including the right to hire, discipline, suspend, or discharge for just cause, to promote, demote and transfer its employees subject to the provisions of the collective bargaining agreement.

Declarations of T. Harwood and R. Swindlehurst

4. Any claim that plaintiff's employer had exercised a right or power retained by it contrary to the provisions, spirit and/or intent of the collective bargaining agreement could properly be addressed by and/or on behalf of an aggrieved employee through the grievance mechanism set forth in the applicable collective bargaining agreement.	Declarations of T. Harwood and R. Swindlehurst 000025
5. A grievance, as defined in the applicable collective bargaining agreement, is a written claim by an employee that the company has violated a provision of or the spirit and/or intent of the collective bargaining agreement by actions or failure to take action which at the time such written claim is filed deprives the aggrieved employee of the right given to such employee under the applicable collective bargaining agreement.	Declarations of T. Harwood and R. Swindlehurst
6. Failure by and/or on behalf of the employee to timely proceed through each step of the grievance procedure constitutes a waiver of that employee's grievance.	Declarations of T. Harwood and R. Swindlehurst 000026

7. In accordance with the provisions of the collective bargaining agreement then in effect, on August 14, 1981, a grievance was filed on behalf of plaintiff complaining of certain condition of his employment at Lockheed California Company, as well as his wages, claiming violation of specific provisions of the applicable collective bargaining agreement.	Declaration of T. Harwood
8. The grievance filed on behalf of plaintiff on August 14, 1981 proceeded through the dispute resolution procedure set forth in the collective bargaining agreement to Step II thereof, in accordance with the provisions of the agreement.	Declaration of T. Harwood
9. On September 30, 1981 the above-referenced grievance was resolved at Step II of the grievance procedure to	Declaration of T. Harwood

the mutual satisfaction of the parties.

10. No further action under the collective bargaining agreement was taken by and/or in behalf of the plaintiff relative to the grievance filed August 14, 1981 after its resolution on 1981.

Declaration of T. Harwood

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11. In accordance with the provisions of the collective bargaining agreement then in effect, on November 11, 1981, a grievance was filed on behalf of plaintiff complaining of certain conditions of his employment at Lockheed California Company, claiming violation of specific provisions of said collective bargaining agreement.

Declaration of T. Harwood

12. The grievance filed November 11, 1981 proceeded through the dispute resolution procedure to Step II thereof, in accordance with the provisions of the applicable collective bargaining agreement.

Declaration of T. Harwood

13. On November 20, 1981 plaintiff's above-referenced grievance was resolved at Step II of the grievance procedure to the mutual satisfaction of the parties.	Declaration of T. Harwood
14. No further action under the collective bargaining agreement was taken by and/or on behalf of plaintiff relative to the grievance filed November 11, 1981 after its resolution on November 20, 1981.	Declaration of T. Harwood
15. In accordance with the provisions of the collective bargaining agreement then in effect, on September 27, 1984, two grievances were filed on behalf of plaintiff complaining of certain conditions of his employment at Lockheed California Company, as well as his wages, claiming violation of specific provisions of the applicable collective bargaining agreement.	Declaration of R. Swindlehurst
16. The grievances filed September 27, 1984 proceeded through the dispute resolution procedure to Step II thereof, in accordance	Declaration of R. Swindlehurst

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with the provisions of the applicable collective bargaining agreement.

17. On February 26, 1985, plaintiff's grievances were resolved at Step II of the grievance procedure to the mutual satisfaction of the parties.

Declaration of R. Swindlehurst

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18. No further action under the collective bargaining agreement was taken by and/or on behalf of plaintiff relative to the grievances filed September 27,

Declaration of R. Swindlehurst

19. On July 15, 1982, plaintiff filed a complaint in Los Angeles County Superior Court, Central District bearing Superior Court Case No. C 418007.

Plaintiff's Complaint No. C 418007

20. On April 15, 1985 plaintiff filed another action in a Los Angeles County Superior Court, Central District of California bearing No. C 543095.

Plaintiff's Complaint No. C 543095

21. Each of plaintiff's actions rely upon, and the allegations contained therein refer only to factual issues

Plaintiff's Complaints No. C 418007, C 543095

previously addressed in and resolved pursuant to the grievance mechanism set forth in the applicable collective bargaining agreement.	000030
22. Plaintiff's complaints rely upon and the allegations contained therein refer only to, conduct relative to the employment relationship, conditions of employment, and wages in the employment relationship between plaintiff and Lockheed California Company.	Plaintiff's Complaints No. C 418007, C 543095
23. Prior to filing his actions, plaintiff did not exhaust the remedies available to him in the grievance procedure set forth in the applicable collective bargaining agreement prior to filing the within pending consolidated actions.	Declarations of T. Harwood R. Swindlehurst

In light of the above, the Court holds that all claims asserted by plaintiff in both actions are preempted by Section 301 of the Labor Management Relations Act, and as such plaintiff's claims must be dismissed as preempted by Federal Law. The claims in the first and second actions are barred by plaintiff's failure to exhaust the grievance procedure set forth in the collective bargaining agreement, and the plaintiff agreed that each grievance should be closed.

The Court further finds that *Allis-Chalmers v. Lueck* 105 S. Ct. 1911 controls.

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The Court further finds that there is no exception under the preemption for alleged retaliatory employment practices committed on/or on behalf of various defendants.

The Court holds that Labor Code Section 1102.5 requires that any act of alleged "whistle blowing" must be based on the violation of a specific state statute.

For the reasons stated above and in reliance on the memorandums of points and authorities and all cases cited therein by moving party, the Court grants the summary judgment as prayed.

The Court knows that the area at the present time is in the state of flux; the Court invites appellate review.

DATED: JANUARY 21, 1987.

THOMAS C. MURPHY

THOMAS C. MURPHY
Judge of the Superior Court

000032

Name, Address and Telephone Number
of Attorney(s)

JAN 21 1987

Attorney(s) for

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES**

KURT BIRTELL, PLAINTIFF(S) vs. LOCKHEED-CALIFORNIA CO., ETC., ET AL DEFENDANT(S)	CASE NUMBER NC 418 007 (transferred Burbank) CERTIFICATE OF MAILING OF COPY OF COURT'S RULING (Rule 232(a) California Rules of Court)

I, FRANK S. ZOLIN County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles, and not a party to the action, hereby certify that on JAN 21, 1987, mailed copies of the court's intended decision in the within action to all parties who appeared at the trial by depositing

- ☐ true copies of the minute order of JAN 21, 1987, Department NC B of the Superior Court of the State of California, County of Los Angeles,
- ☐ true copies of the written statement of intended decision filed herein , 19
- ☐ true copies of the RULING filed by the court on JAN 21, 1987, enclosed in sealed envelopes with postage thereon fully prepaid in the United States Post Office mail box BURBANK, California, addressed as follows:

ALLRED, MAROKO,
GOLDBERG and
RIBAKOFF
6380 Wilshire Blvd. Ste. 1404
Los Angeles, CA 90048

CHASE, ROTCHFORD,
DRUKKER and BOGUST
700 S. Flower St., 5th Flr.
Los Angeles, CA 90017

JAN 21, 1987

FRANK S. ZOLIN County Clerk and Clerk of the Superior Court of the State of California County of Los Angeles.

MAR 3 1987
CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KURT BIRTELL,

Plaintiff,

vs.

LOCKHEED-CALIFORNIA COMPANY, a Division of LOCKHEED CORPORATION LOCKHEED CORPORATION, K.E. KLEINBERG, JIM KALISH and DOES 1 through 100, Inclusive,

Defendants.

CASE NO. C 418 007
C 543 095
(Consolidated and Transferred to North Central District-Burbank)

~~PROPOSED~~
JUDGMENT

The motion filed on behalf of defendants, LOCKHEED-CALIFORNIA COMPANY, LOCKHEED CORPORATION, K.E. KLEINBERG and JIM KALISH for summary judgment and/or for an order determining the certain factual and legal issues are without substantial controversy, in the above-referenced matter came on regularly for hearing on January 9, 1987 in Department B of the above-entitled court, located at 300 East Olive Street, Burbank, California, the Honorable Thomas C. Murphy, judge presiding. The moving parties, LOCKHEED-CALIFORNIA COMPANY, LOCKHEED CORPORATION, K.E. KLEINBERG, and JIM KALISH, appeared by and through their attorney of record,

Clay Robbins, III, of Chase, Rotchford, Drukker & Bogust. Responding party, KURT BIRTELL, appeared through his attorney of record, Michael Maroko of Allred, Maroko, Goldberg & Ribakoff.

The court, having fully considered the papers filed in support of and opposition to said motion, as well as the documentary evidence contained therein and the argument of counsel for both parties at the hearing thereon, makes the following findings of fact and conclusions of law:

1. The court finds that at all times referred to in plaintiff's complaint, plaintiff was a member of the collective bargaining unit addressed in the applicable collective bargaining agreements between plaintiff's employer and the Aeronautical Industrial District, Lodge 727 and the International Association of Machinist and Aerospace Workers ("Union").
2. The court finds that at all times referred to in plaintiff's complaint, the Union was the exclusive representative of the plaintiff for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and all other conditions of plaintiff's employment.

3. The court finds that pursuant to the applicable collective bargaining agreement, plaintiff's employer had and retained control and power to manage the plant and direct the working forces, including the right to hire, discipline, suspend, or discharge for just cause, to promote, demote and transfer its employees subject to the provisions of the collective bargaining agreement.
4. The court finds that any claim that plaintiff's employer had exercised the right or power retained by it contrary to the provisions, spirit

and/or intent of the collective bargaining agreement could properly be addressed by and/or on behalf of an agreived employee through the grievance mechanism set forth in the applicable collective bargaining agreement.

5. The court finds that a grievance, as defined in the collective bargaining agreement, is a written claim by an employee that the company has violated a provision of or the spirit and/or intent of the collective bargaining agreement by actions or failure to take action which at the time such written claim is filed deprives the aggrieved

employee of a right given to such employee under the applicable collective bargaining agreement.

6. The court finds that failure by and/or on behalf of the employee to timely proceed through each step of the grievance procedure constitutes a waiver of that employee's grievance.
7. The court finds that in accordance with the provisions of the collective bargaining agreement then in effect, on August 14, 1981 a grievance was filed on behalf of plaintiff complaining of certain conditions of his employment at LOCKHEED-CALIFORNIA COMPANY, as well as his wages, claiming violation of specific provisions of the applicable collective bargaining agreement.
8. The court finds that the grievance filed on behalf of plaintiff on August 14, 1981 proceeded through the dispute resolution procedure set forth in the collective bargaining agreement to step II thereof, in accordance with the provisions of the agreement.
9. The court finds that on September 30, 1981, the above-referenced grievance was resolved at

step II of the grievance procedure to the mutual satisfaction of the parties.

10. The court finds that no further action under the collective bargaining agreement was taken by and/or on behalf of the plaintiff relative to the grievance filed August 14, 1981, after its resolution on September 30, 1981.
11. The court finds that in accordance with the provisions of the collective bargaining agreement then in effect, on November 11, 1981 a grievance was filed on behalf of plaintiff complaining of certain conditions of his employment at LOCKHEED-CALIFORNIA COMPANY, claiming violation of specific provisions of said collective bargaining agreement.
12. The court finds that the grievance filed on November 11, 1981 proceeded through the dispute resolution procedure to step II thereof, in accordance with the provisions of the applicable collective bargaining agreement.

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13. The court finds that on November 20, 1981, plaintiff's above-referenced grievance was resolved at step II of the grievance procedure to the mutual satisfaction of the parties.
14. The court finds that no further action under the collective bargaining agreement was taken by and/or on behalf of plaintiff relative to the grievance filed November 11, 1981, after its resolution on November 20, 1981.
15. The court finds that in accordance with the provisions of the collective bargaining agreement then in effect, on September 27, 1984, two grievances were filed on behalf of plaintiff complaining of certain conditions of his

employment at LOCKHEED-CALIFORNIA COMPANY, as well as his wages, claiming violations of specific provisions of the applicable collective bargaining agreement.

16. The court finds that the grievances filed September 27, 1984, proceeded through the dispute resolution procedure to step II thereof, in accordance with the provisions of the applicable collective bargaining agreement.

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17. The court finds that on February 26, 1985, plaintiff's grievances were resolved at step II of the grievance procedure to the mutual satisfaction of the parties.
18. The court finds that no further action under the collective bargaining agreement was taken by and/or on behalf of plaintiff relative to the grievances filed September 27, 1984 after its resolution on February 26, 1985.
19. The court finds that on July 15, 1982, plaintiff filed a complaint in the Los Angeles County Superior Court, Central District, bearing Superior Court Case No. C 418 007.
20. The court finds that on April 15, 1985, plaintiff filed another action in the Los Angeles County Superior Court, Central District, bearing Superior Court Case No. C 543 095.
21. The court finds that each of plaintiff's actions referred to above rely upon, and the allegations contained therein refer only to, factual issues previously addressed and resolved pursuant to

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the grievance mechanism set forth in the applicable collective bargaining agreement.
22. The court finds that plaintiff's complaints rely upon and the allegations contained therein refer

only to, conduct relative to the employment relationship, conditions of employment, and wages in the employment relationship between plaintiff and LOCKHEED-CALIFORNIA COMPANY.

23. The court finds that plaintiff did not exhaust the remedies available to him in the grievance procedure set forth in the applicable collective bargaining agreement prior to the filing the within pending consolidated actions.

The court finds the above-referenced factual and legal issues have been established without substantial controversy by moving parties in the declarations of Thomas Harwood, Rod Swindlehurst and Chuck Newman, as well as in the other documentary evidence filed and/or referred to in support of the above-referenced motion. The court having made the above-referenced findings in addition holds that all claims asserted by plaintiff in both actions are preempted by section 301 of the Labor Management Relations Act, and as such plaintiff's claims in the within pending consolidated actions must be dismissed as preempted by federal law. In addition, the court holds that all claims asserted by plaintiff in both

actions are barred by reason of plaintiff's failure to exhaust the grievance procedure set forth in the collective bargaining agreement, and that plaintiff agreed that each grievance should be closed. The court further finds that the exception relied upon by plaintiff in his opposition papers to the requirement that the grievance procedures set forth in the collective bargaining agreement be exhausted is not applicable to the actions now before this court. By reasons of said findings of fact and conclusions of law as set forth above, this court finds that the claims asserted in the within pending actions present no further disputed issue of material fact as to defendants LOCKHEED-CALIFORNIA COMPANY, LOCKHEED CORPORATION, K.E. KLEINBERG and JIM KALISH.

WHEREFORE, by virtue of the law set forth in defendants' moving papers, and the findings of this court as set forth more fully above, it is ORDERED, ADJUDGED and DECREED that plaintiff take nothing by reason of his complaints now before this court against defendants LOCKHEED-CALIFORNIA COMPANY, LOCKHEED CORPORATION, K.E. KLEINBERG and JIM KALISH, and that said defendants have and recover from said plaintiff the costs and disbursements incurred in defending the within action, the sum of $ _____.

DATED: January 22, 1982

THOMAS C. MURPHY

Thomas C. Murphy
Judge of the Superior Court

PROOF OF SERVICE BY MAIL
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 700 South Flower Street, 5th Floor, Los Angeles, California 90017.

On Jan. 30, 1987, I served the foregoing document described as Proposed Judgment

_____

_____

on interested parties. in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California addressed as follows:

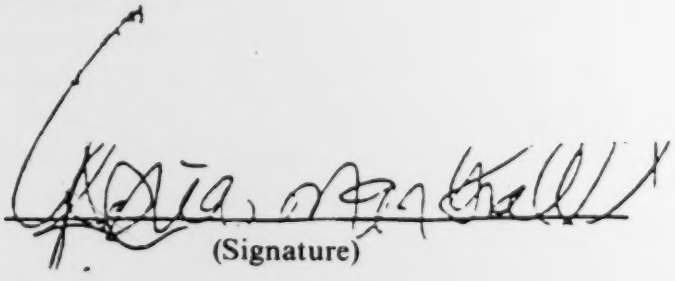
Allred, Maroko, Goldberg and Ribakoff
6380 Wilshire Bl., Ste. 1404
Los Angeles, CA 90048

Executed on Jan. 30, 1987 at Los Angeles, California.

(check applicable paragraph below)

☒ (State) I declare under penalty of perjury that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



(Signature)

LOCKHEED CORPORATION
SUBSIDIARIES AND AFFILIATES

Airod Sendirian Berhad
Analytyx Electronic Systems, Inc.
Artemis management Systems Holdings Limited
Artemis Management Systems Pty. Limited
Artemis Middle East E.C.
Austcad Pty. Inc.
AVICOM International, Inc.
AVICOM International, Inc., S.A.

CADAM Deutschland GmbH
CADAM France SARL
CADAM Inc.
CADAM Inc.
CADAM Internatinal B.V.
CADAM Pacific, Ltd.
CADAM Systems Company, Inc.
Calcomp A.B.
CalComp, B.V.
CalComp Canada, Inc.
CalComp Espana S.A.
CalComp Europe Ltd.
CalComp European Management Corporation
CalComp Foreign Sales Corporation
CalComp GmbH
CalComp Inc.
CalComp Limited
CalComp Pacific, Inc.
CalComp S.A.
CalComp S.P.A.
CalComp Sanders China Limited
CalComp technology and Procurement, Inc.
CalComp Computer Products, Inc.

Datacom Municipal Systems of Pennsylvania,Inc.
Datacom Systems Corporation
Datacom Systems (UK) Limted

Forjohn Limited

Gulf Technology Systems Group

High Point Realty Corporation
Hi-Tension Realty Corporation

Image Resource Corporation

LAH Limited

000041

Letlock Saudi Arabia Company Ltd.
Lockheed Aeromod Center, Inc.
Lockheed Aeronautical Systems Company
Lockheed Aeroparts, Inc.
Lockheed Air Terminal, Inc.
Lockheed Air Terminal of Canada, Inc.
Lockheed Air Terminal of New York Inc.
Lockheed Air Terminal, S.A.
Lockheed Aircraft (Asia) Limited
Lockheed Aircraft (Australia) Pty. Limited
Lockheed Aircraft International Limited
Lockheed Aircraft Service International
Lockheed Aircraft Service Singapore Private Limited
Lockheed Arabia
Lockheed Canada Inc.
Lockheed Corporation
Lockheed Corporation International
Lockheed Corporation (International) S.A.
Lockheed DataPlan, Inc.
Lockheed Electronics Company, Inc.
Lockheed Engineering & Sciences Company, Inc.
Lockheed Finance Corporation
Lockheed Foreign Sales Corporation
Lockheed Georgia International Services, Inc.
Lockheed Internation Limited Taiwan
Lockheed International Service and Investment Corporation
Lockheed Leadership Fund
Lockheed Materials Processing Company

Lockheed Missiles & Space Company, Inc.
Lockheed Mortgage Corporation
Lockheed Properties Division
Lockheed Saudi Programs
Lockheed Space Flight Company
Lockheed Space Operations Company
Lockheed Support Systems, Inc.
Lockheed Systems Company, Inc.
Lockheed Technical Enterprises Corporation
Lockheed Technical Operations Company, Inc.
Lockheed Technical Services Company, Inc.
Lockheed Western Export Company
Lockport Marine Company
Martemis A.G.
Memrykord Limited
Metier, Inc.
Metier Management Systems Benelux B.V.
Metier Management Systems Deutschland GmbH
Metier Management Systems France S.A.R.L.
Metier Management Systems Holding B.V.
Metier Management Systems, Inc.
Metier Management Systems International Limited
Metier Management Systems International N.V.
Metier Management Systems Italia S.R.L.
Metier Management Systems Limited (England)
Metier Management Systems Limited (Japan)

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Metier Management Systems Pte. Ltd.
Metier Management Systems Sweden Aktiebolsg
Metier systems, Ltd.
Murdock Engineering Company

N.V. CalComp S.A.
Nippon CalComp KK

Pacific Aerospace Corporation Limited

Sanders Associates, Inc.

Sanders Associates International, Inc.
Sanders Canada, Inc.
Sanders Development Corporation
Star Reconveyance Corporation

Terak Corporation
Transnational Housing Company
TriStar Parts, Ltd.

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 23, 1988, I served the within *Petition for Writ of Certiorari to the Court of Appeal, State of California, Second Appellate District, Division Four* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Clerk of the Los Angeles
Superior Court
for the Honorable
Thomas C. Murphy
300 East Olive Street
Burbank, California 91502

Michael Maroko, Esq.
Allred, Maroko, Goldberg &
Ribakoff
6380 Wilshire Boulevard
Suite 1404
Los Angeles, California 90048

Joseph Posner
Joseph Posner, Inc.
16311 Ventura Boulevard
Suite 555
Encino, California 91436

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 23, 1988, at Los Angeles, California.

NOV 30 1988

Betty J. Malloy
(Original signed)

88-909

Supreme Court, U.S.
FILED
DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

In the Supreme Court of the United States

October Term, 1988

LOCKHEED CALIFORNIA COMPANY,
a Division of LOCKHEED CORPORATION,
LOCKHEED CORPORATION,
K. E. KLEINBERG AND JAMES KALISH,

Petitioners,

v.

KURT BIRTELL,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ALLRED, MAROKO, GOLDBERG & RIBAKOFF
ALAN P. RIBAKOFF
6380 Wilshire Boulevard
Suite 1404
Los Angeles, California 90048
Telephone: (213) 653-6530

Attorneys for Respondent
KURT BIRTELL

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RESPONSE TO PETITION

FOR WRIT OF CERTIORARI

Respondent, KURT BIRTELL, (hereinafter referred to as "Birtell") respectfully opposes the Petition of LOCKHEED-CALIFORNIA COMPANY, a Division of LOCKHEED CORPORATION, LOCKHEED CORPORATION, K. E. KLEINBERG and JAMES KALISH (hereinafter referred to collectively as "Lockheed") for a Writ of Certiorari to review the decision of the California Court of Appeal, Second Appellate District, Division Four, which was entered in this case on May 17, 1988. Review was properly denied by the California Supreme Court by its order of August 25, 1988.

I

QUESTIONS PRESENTED

This case arises from the employment relationship between Birtell and Lockheed, wherein Lockheed has trammelled upon Birtell's rights to be free from retaliatory harassment and discipline for having disclosed information to a government agency. The resolution of this matter turns on the question of whether federal labor law preempts Birtell's state law claims for violation of public policy, unfair employment practices (California Labor Code §1102.5), conspiracy to retaliate and intentional infliction of emotional distress.

The California Court of Appeal, Second Appellate District, Division Four, held that in this instance, federal labor

law did not displace Birtell's state law claims. Contrary to Lockheed's assertion, there is neither necessity nor justification for this Court to consider the decision and opinion filed by the Court of Appeal. Clear standards of law have been enunciated by which the issue of preemption is to be decided. Such standards were correctly applied to the facts of the instant case by the Court of Appeal.

II

STATEMENT OF FACTS

A. Birtell's Employment

Lockheed originally employed Birtell in August, 1979 as a Magnetic Particle Inspection Operator (Trainee) at Plant B-1. He excelled in performance of his duties and quickly received certification in "Penetrant Inspection".

Penetrant inspection is considered entry-level work, involving mostly manual inspection and testing of materials. As Penetrant Inspector, Birtell enjoyed an excellent relationship with management and his co-workers. He received regular satisfactory performance evaluations.

In January, 1980 Lockheed recognized Birtell's potential and assigned him to training in Ultrasonics Non-Destructive Testing ("NDT") Although he received Level I certification in June, 1980, he was not permitted to perform inspections alone because he had not yet satisfied time-in-job requirements specified by the military. Later that year he received Level II certification in ultrasonics as well as an interim secret clearance. He

received permanent secret clearance in November and top secret clearance in early 1981.

His duties as Ultrasonics Inspector included inspection and certification of materials being manufactured for various departments of the United States military. Birtell worked primarily on Advanced Development Projects ("ADP"), top secret projects, such as the Trident C-4, SR-71, T-38, and P3-Orion. ADP projects are considered to be the best positions in terms of salary and career potential. Such work is closely regulated by the federal government and specific requirements, including training of the inspectors, are detailed in United States Military Specifications and included in Lockheed's contracts with its customers.

The work of certified Ultrasonics Inspectors is crucial. They are responsible for inspecting parts and certifying that inspected parts had no defects, or, if defects were found, stating what they were.

B. Discovery of Safety and Security Violations

During his assignment in the NDT Laboratory Birtell observed that the inspection procedures on the C-4 Trident missile nose cap were not being done according to Military Specifications.

He also began to form the opinion that other tests being performed by the Ultrasonics Inspectors were not proper, and that there may even have been improper certification of certain inspectors. One area of concern involved

the "Panic Program" on the P-3 Orion engine mounts, which was inspected by trainees, without necessary supervision. It was Birtell's understanding that Military Specifications required certified inspectors at a minimum Level II.

In addition, Birtell became concerned about another aspect of testing: calibration standards used on L-1011 bonded panels. These concerns were brought to the attention of his managers, but to Birtell's dismay, no action was taken to address or correct the problem areas.

C. Office of Special Investigations Complaint

Mindful of the highly sensitive nature of the projects on which he was working, Birtell eventually contacted the

U.S. Air Force Office of Special Investigations ("OSI") to discuss the concerns hereinabove noted. At no time did Birtell disclose any confidential information.

OSI planned to conduct an investigation. Birtell was advised not to reveal the proposed investigation. At work the next day, Birtell was confronted by management about not revealing company problems to outside entities. Birtell began to sense the distinct possibility of retaliation.

D. Retaliation

Three days later Birtell was "debriefed" by Lockheed's Security Department, who pulled his access to security projects without explanation. He was immediately downgraded and transferred from the NDT lab, and to

date, has not been returned. His fear of possible retaliation turned into reality. In fact, Birtell's continued employment with Lockheed has been threatened on a regular basis.

Birtell did file grievances with his union, the International Association of Machinists and Aerospace Workers and Plant Protection Lodge No. 1638/Aeronautical Industrial District Lodge 727, in an attempt to regain his security access and payment of overtime missed due to lack of such access. He alleged that his ADP access badge was pulled because he complained of several security violations to the OSI.

After some initial discussion with Lockheed, Birtell believed it would be futile to pursue his grievances. The union agreement does not address the

issue of whistle blowing or retaliation for whistle blowing. Nor does it provide for compensatory or punitive damages to redress harm caused by outrageous and unlawful retaliatory conduct of the type alleged.

Although his security access was eventually restored and in spite of his excellent past performance and qualifications, Birtell remains in an entry level position, performing penetrant inspection work. He has been repeatedly passed over for return to his former duties and responsibilities, while various individuals lacking requisite qualifications and/or certifications were selected for Ultrasonics Inspector or other positions in Quality Assurance to which Birtell, should have been assigned.

Lockheed has consistently denied

there was any basis for Birtell's complaints to OSI. Yet shortly after Birtell's complaints and the OSI investigation, Lockheed retained an independent consultant to review compliance with Military Specifications. That review resulted in various recommendations for procedural changes, some of which bear directly on areas about which Birtell had complained, e.g., improper training of inspectors, and improper certifications. Moreover, the OSI investigator felt there was more than sufficient evidence to refer the matter to the U.S. Attorney's office.

E. Damages

Birtell has continued in employment at Lockheed, performing well in his lesser current position. But, he

feels no real satisfaction; instead he lives with the constant threat of termination, ostracism from his co-workers, and total intimidation. This is the reward Lockheed, and its managers, have bestowed on him for exercising his legal rights and fulfilling his duty as an employee and an American citizen. This is the reward others at Lockheed can look forward to if they choose to report wrongdoing and fraud, out of genuine concern for public safety and national security.

As a direct result of the outrageous continuing retaliation and harassment inflicted on him by defendants, Birtell has suffered severe emotional distress and anguish, for which no remedy is provided under the terms of the applicable collective

bargaining agreement.

III

REASONS FOR DENYING THE WRIT

A. Federal Labor Law Does Not Preempt State Rules That Proscribe Conduct or Establish Rights and Obligations, Independent of a Collective Bargaining Agreement.

It is beyond cavil that, as a general rule, federal labor policy requires employees covered by a collective bargaining agreement to utilize available contract grievance procedures to redress employment disputes. Teamsters Union v. Lucas Flour Company, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962). Birtell has never denied this fact. However, it is also beyond cavil that not every suit

concerning employment will be preempted by federal labor law. Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971).

Recognizing the broad preemptive force of Section 301 of the Labor Management Relations Act (hereinafter "LMRA"), this Court decided Lingle v. Norge Division of Magic Chef, Inc., ___ U.S. ___, 108 S.Ct. 1877, 56 U.S.L.W. 4512 (June 6, 1988). A simple, straightforward test was reenunciated, based on reasoning developed in Lucas Flour, supra, and Allis-Chalmers Corporation v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985):

> Thus, Lueck faithfully applied the principle of § 301 preemption developed in Lucas Flour: if the resolution of a

> state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles -- necessarily uniform throughout the nation -- must be employed to resolve the dispute. Lingle, 108 S.Ct. at 1881. (Footnotes omitted)

Despite Lockheed's fervent desire to escape responsibility in tort for its actions, their efforts to unduly complicate this standard must fail. Just as in Lingle, supra, the instant claim

for retaliatory action can be decided without interpretation of any term of the collective bargaining agreement governing the employment relationship between the parties. As this Court aptly observed:

> To defend against a retaliatory discharge claim, an employer must show a non-retaliatory reason for the discharge, (citation omitted); this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. Lingle, supra, at 1882.

The Court of Appeal properly applied that standard in rejecting petitioners' argument below:

> [A]s long as California state law establishes a right in plaintiff independent of that agreement there is no preemption. Accordingly, we must determine whether there is an issue of material fact whether the subject matter of this suit is actionable under California law independent of the subject collective bargaining agreement. Birtell v. Lockheed-California Company, et al., Appendix "A" to Lockheed's Petition at page A-12. (Emphasis in original.)

B. **California Has Prohibited Employment Retaliation for Whistle-Blowing in an Effort to Protect the Health, Safety and Welfare of Its Citizens.**

Lockheed has argued, both here and below, that there is no legitimate state interest, justifying exception to the general policy of preemption. Lockheed avers that Labor Code §1102.5 is "not directed to any legitimate interest of the State of California and the health and welfare of its citizens". (See, Petition, page 14.) Yet, the Ninth Circuit Court of Appeals decision in Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) specifically held to the contrary:

> California's interest in providing a cause of action

> for violation of public policy or a statute is the enforcement of the underlying statute or policy, not the regulation of the employment relationship. Garibaldi, 726 F.2d at 1374.

Throughout this litigation, petitioners have denigrated and misconstrued Birtell's claims, asserting that no state public policy is at issue. But Birtell is a "whistle-blower" in a classic sense, in grave need of protection. He became aware that certain certification and inspection procedures at Lockheed were not being followed, and reported his concern to what he believed was the appropriate governmental agency. He was concerned that Lockheed may have been in breach of its contract with the Government and that federal regulations

may have been violated. His primary concern, however, was for his fellow citizens, both in California and elsewhere, who could be hurt or killed if an improperly manufactured airplane were allowed in the air because of a faulty or cursory inspection by an unqualified employee. Petitioners have cavalierly dismissed, without analysis, the significant state interest in protecting the health and safety of its citizens from the possibility of an airline disaster.

Moreover, California has a direct interest in encouraging and promoting the exposure of health or safety violations by offering protection to individuals who report such violations to appropriate state or federal agencies. Yet Lockheed would deprive Birtell of such protection,

asserting that his claims "refer solely to matters of federal concern which are expressly sanctioned as the proper subject of collective bargaining agreements". (See, Petition, page 18.)

To assert that the information reported by Birtell did not impact any legitimate California interest is misguided. Not only does Birtell allege non-negotiable state law claims for violation of public policy within the exception to preemption allowed by Lingle, supra, Garibaldi, supra, Paige v. Henry G. Kaiser, 826 F.2d 857 (9th Cir. 1987), and others, he alleges a viable cause of action for violation of California Labor Code §1102.5.

Congress never intended to "preempt state rules that proscribe conduct, or establish rights and

obligations, independent of a labor contract." Allis-Chalmers, 471 U.S. at 212. Federal law does not direct bargaining on the subject matter of these claims, that is retaliation for whistle-blowing. Moreover, there is absolutely no evidence that the collective bargaining agreement here at issue even mentions, let alone provides protection for, the subject.

Thus, where resolution of state law claims can be made without reference to the terms of a collective bargaining agreement, preemption is inappropriate, and the Court of Appeal so held. It is well settled that §301 does not "delegate to unions and unionized employers the power to exempt themselves from whatever labor standards they disfavor." Allis-Chalmers, 471 U.S. at 211. The

Court of Appeal was correct in rejecting petitioners' analysis, which confuses the issues of independence from the labor agreement and the weight of the state policy to be furthered. Under this Court's analysis in Allis-Chalmers, supra, and San Diego Unions v. Garman, 359 U.S. 236 (1959), it is unnecessary to balance the state interest against the federal interest. If the prerequisites to preemption are met, regardless of the state interest, state law will fall to federal law.

Petitioners have also mischaracterized the Legislature's express purpose in enacting §1102.5, suggesting that it was only designed for "at-will employees with some minimum protection against retribution by an employer". (See, Petition, page 19.) The

legislative history cited by petitioners in support of that proposition nowhere mentions "at-will" employees. In fact, the full quote from the staff comments to A.B. 2452, the precursor of Labor Code §1102.5 states:

> The intent of this measure is to afford employees some minimum protection against retribution by an employer when the employee reports crimes or violations of the law incurring at his or her place of employment. (Emphasis added.)

Petitioners attempt to distinguish Garibaldi, supra, and Local 24, Teamsters v. Oliver, 358 U.S.283 (1959) arguing that Birtell has no state law claims for violation of public policy or for violation of the California Labor

Code §1102.5. Such results are ludicrous, and contrary to legal precedent. By this reasoning, an employee of Lockheed, not covered by a collective bargaining agreement, in the exact same circumstances as Birtell, would be able to recover in tort for all harm suffered as a result of retaliation.

The instant action presents the very circumstances envisioned by the California legislature in offering protection for whistle-blowers. Birtell, as a result of his choosing to report wrongdoing, has become a persona non grata at Lockheed, pigeonholed, stifled in a previously exceptional career. He has been ostracized from his co-workers, threatened and intimidated. He has been demoted, denied training, overtime hours, and promotion. He is denied even the

smallest dignity our society requires employers to give employees - recognition for a job well done. Petitioners would have this court disregard the significant harm suffered by Birtell, and limit him to the grievance procedure provided in his labor contract, a contract which neither in spirit nor in substance addresses this issue.

C. **No Need for Review Has Been Established by Petitioners, as the Test for Preemption Has Been Clearly Articulated by the Supreme Court, and Followed by Other Courts in Subsequent Decisions.**

Throughout the various opinions dealing with this question, the articulation of the test for preemption has remained constant. See, generally,

Lingle, supra; Allis-Chalmers, supra; International Brotherhood of Electrical Workers AFL-CIO v. Hechler, ___U.S.___, 107 S.Ct. 2161, 95 L.Ed.2d. 791 (1987), Caterpillar, Inc. vs. Williams, ___U.S.___, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

Petitioners cite to several post-Lingle decisions in a desperate attempt to create confusion sufficient to justify the requested Writ. Willoughby v. Central Illlinois Light Co., 108 S.Ct. 2812 (1988); Doherty v. Pansec Inc., 108 S.Ct. 2812 (1988); Clark et al. v. Momence Packing Co., 108 S.Ct. 2813 (1988); Martin v. Carling National Breweries, 108 S.Ct. 2813 (1988) Hanneken v. Dixon Distributing Co., 108 S.Ct. 2813 (1988); DeSoto v. Yellow Freight Lines Co., 108 S.Ct. 2813 (1988); Mays v. R.J.

Reynolds Co. 108 S. Ct. 2814 (1988).

However, in each case cited, the lower Court had held the state law claims pre-empted by federal law. In each case cited, this Court reversed and remanded, with instructions to reconsider in light of Lingle, supra.

As demonstrated hereinabove, the Opinion of the California Court of Appeal in this case comports with Lingle. There is thus no need for this Court to intervene, or to correct the Opinion below.

IV

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 6380 Wilshire Boulevard, Suite 1404, Los Angeles, California 90048; that on December 23, 1988, I served the within **Response to Petition for Writ of Certiorari** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 23, 1988, at Los Angeles.

Kate Johnson

Kate Johnson